UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 92-20103
Hon. David M. Lawson

NICHOLAS GARCIA,
JOHN OVALLE,
Defendant.
_____/

CORRECTED
OPINION AND ORDER GRANTING MOTION BY DEFENDANT, NICHOLAS GARCIA, TO DISMISS FOURTH SUPERSEDING INDICTMENT

This case is scheduled for trial to begin on October 31, 2000. The defendant, Nicholas A. Garcia, has filed a motion to dismiss the Fourth Superseding Indictment [dkt #756] which was returned by the grand jury on August 23, 2000, on the ground that it violates the statute of limitations, 18 U.S.C. § 3282, which provides that:

> no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

The government had filed a response in opposition to the motion, and the defendant has filed a reply. The Court finds that the parties have adequately set forth the relevant law and facts in their briefs and motion papers, and oral argument would not aid in the disposition of the instant motion. *See E.D. Mich. LR 7.1(e)(2).* Accordingly, the Court **ORDERS** that the motion be decided on the briefs submitted. For the reasons stated below, the defendant's Motion to Dismiss the Fourth Superseding Indictment is **GRANTED**.

I.

The original indictment in this case was returned on December 9, 1992. That indictment charged nine defendants with conspiracy with intent to distribute and distribution of marijuana. It alleged that the conspiracy existed from approximately November 1992 through December 1992.

The second indictment, or first superseding indictment, was returned on March 24, 1993. It was identical to the original indictment with the exception of the starting date of the conspiracy. Rather than November 1992, the superseding indictment alleged that the conspiracy existed from September 1992 through December 1992. The defendant was tried and convicted by jury on this indictment along with 3 co-defendants (one defendant was acquitted); however, the Court of Appeals for the Sixth Circuit reversed the convictions holding that the jury selection plan under which the defendant was indicted was constitutionally flawed and violated the Jury Selection Act. *United States v. Ovalle* , 136 F.3d 1092, 1109 (6th Cir. 1998).

The case was reopened on May 4, 1998 and the defendant was indicted on a Second Superseding Indictment. This was the same as the First Superseding Indictment except that some co-defendants' names were removed if their cases were resolved. There was no arraignment at that time.

On May 13, 1998, the Third Superseding Indictment was filed and differed from the previous indictments in two key ways. It expanded the time frame of the conspiracy by several years, and it expanded the conspiracy to include cocaine and heroine. The defendant filed a motion to dismiss and a supplemental motion to dismiss. This Court's predecessor, Judge Victoria A. Roberts, dismissed the Third Superseding Indictment on the latter motion on February 25, 2000. In response to the dismissal, the government arraigned the defendant on the Second Superseding Indictment issued back in 1998.

Then, on August 23, 2000, the Fourth Superseding Indictment was filed and resembled the second superseding indictment with the following pertinent variations: (1) the fourth superseding indictment contains reference to "21 U.S.C. 841(b)(1)(A)(vii)," and charges that the defendant possessed, intended to distribute, and did distribute quantities totaling 1000 kilograms or more of marijuana; and (2) the Fourth Superseding Indictment contains reference to the prior felony drug convictions of the defendants.

In the Second Superseding Indictment, the grand jury charged Nicholas Garcia and others in pertinent part as follows:

> From at least sometime in September, 1992, the precise time unknown to the grand jury, and continuing until approximately December 2, 1992, within the Eastern District of Michigan, Northern Division and elsewhere, **NICHOLAS A. GARCIA, ALEXANDER OVALLE, BENITO S. CANALES and JOHN OVALLE, JR. a/k/a JUAN C. OVALLE,** defendants herein, did knowingly, intentionally and unlawfully conspire and agree together, and with other persons whose names are both known and unknown to the grand jury, to commit an offense or offenses against the United States contrary to 21 U.S.C. section 841(a)(1), that is to possess with intent to distribute and to distribute various quantities of marijuana, a Schedule I controlled substance, in violation of Section 846 of Title 21, United States Code.

The Fourth Superseding Indictment contains similar language but with some material differences. In it, the grand jury charges:

> From at least sometime in September, 1992, the precise time unknown to the grand jury, and continuing until approximately December 2, 1992, within the Eastern District of Michigan, Northern Division and elsewhere, **NICHOLAS A. GARCIA, and JOHN OVALLE, JR. a/k/a JUAN C. OVALLE,** defendants herein, did knowingly, intentionally and unlawfully conspire and agree together, and with other persons whose names are both known and unknown to the grand jury, to commit an offense or offenses against the United States contrary to 21 U.S.C. section 841(a)(1), and 841(b)(1)(A)(vii), that is to possess with intent to distribute and to distribute various quantities totaling 1000 kilograms or more of marijuana, a Schedule I controlled substance, in violation of Section 846 of Title 21, United States Code.
>
> . . .

> Further, Nicholas A. Garcia participated in the above-described conspiracy after two prior convictions for felony drug offenses had become final, in that in 1986 Nicholas A. Garcia was convicted and sentenced for such offenses in the United States District Court for the Western District of Texas; and John Ovalle, Jr., a/k/a Juan C. Ovalle, participated in the above-described conspiracy after a prior conviction for a felony drug offense had become final, in that in 1985 John Ovalle, Jr., was convicted and sentenced for such an offense in the United States District Court for the Eastern District of Michigan.

As the government cogently explained in its response to the defendant's motion to dismiss, the Fourth Superseding Indictment was sought in order to address some deficiencies that may have existed in the Second Superseding Indictment in light of the Supreme Court's decision in *Apprendi v. New Jersey* ___ U.S. ___, 120 S. Ct. 2348 (2000). The government agrees that:

> The second superseding indictment was consistent with the existing rule in the Sixth Circuit, while the fourth superseding indictment is consistent with a new rule created by the Supreme Court in *Apprendi*. In its *Apprendi* decision the Supreme Court recognized that defendants have constitutional rights previously not known to exist. The fourth superseding indictment is merely the government's compliance with the *Apprendi* decision, not an enhancement or alteration of the charge formerly made in the second superseding indictment. The charge is, therefore, no broader under current law than it was under the law at the time of the earlier indictments. No prejudice to the defendant results from the charges.

Government's Response to Defendant's Motion to Dismiss and Brief, p. 5.

The defendant argues that the Fourth Superseding Indictment expands the scope of the charge brought in the Second Superseding Indictment because it alleges a specific quantity of contraband substance. Under most circumstances, this observation would be irrelevant: the government may return to the grand jury to obtain new or superseding indictments against a defendant before jeopardy attaches. *See DeMarris v. United States*, 487 F.2d 19, 21 (8th Cir. 1973), *cert. denied* 94 S. Ct. 1570 (1974).

However, in this case the Fourth Superseding Indictment was returned well beyond the five-year period of limitation and would be brought out of time unless it relates back to the date of the

Second Superseding Indictment. *United States v. Smith*, 197 F.3d 225 (6th Cir. 1999). A superceding indictment will relate back if it is brought while the previous indictment is still pending and it does not broaden or significantly alter the original charge. *Id.* at 228 ("[A]s long as the superseding indictment does not broaden the original indictment, the superseding indictment relates back to the filing of the original indictment even if the superseding indictment is filed outside of the statute of limitations."); *United States v. Grady*, 544 F.2d 598, 601 (2d Cir. 1976) ("Since the statute stops running with the bringing of the first indictment, a superseding indictment brought at any time while the first indictment is still validly pending, if and only if it does not broaden the charges made in the first indictment, cannot be barred by the statute of limitations.")

In order to adjudicate the defendant's motion, this Court must examine the Fourth Superseding Indictment to determine whether it broadens or significantly amends the original charge.

II.

Before the decision in *Apprendi v. New Jersey*, *supra*, the approved practice in this Circuit for charging controlled substance violations under 21 U.S.C. § 841 was to set forth in the indictment the violation in the language stated in 21 U.S.C. § 841(a)(1) or (2), but not to charge the quantity of the controlled substances or any other penalty-enhancing facts because those facts constituted "merely . . . sentencing consideration[s]." *United States v. Moreno*, 899 F.2d 465, 473 (6th Cir. 1990). In fact, a jury's decision as to the quantity of drugs involved in the violation was not binding upon the sentencing court, which was free to make its independent determination of quantity based on a preponderance-of-evidence standard. *Id.*

In this case, the government argues, correctly, I believe, that the *Apprendi* decision commands that such practice be changed. In *Apprendi*, the defendant was convicted of violating a statute which

prohibited possessing a firearm for an unlawful purpose. The prescribed penalty of five to ten years imprisonment was enhanced to ten to twenty years, however, if the sentencing judge found by a preponderance of the evidence that the defendant committed the crime with the intent to intimidate a person because of race. 120 S. Ct. at 2351-2352. On review, the Supreme Court vacated Apprendi's sentence and held that:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones* [*v. United States*, 526 U.S. 227 (1999)]. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-53 (opinion of Stevens, J.); *see also, Id.* at 253, 526 U.S. 227 (opinion of Scalia, J.).

120 S. Ct. at 2362-2363.

In the aftermath of *Apprendi*, several courts have addressed the question of whether the penalty provisions contained in 21 U.S.C. § 841(b) remain as "mere [] sentencing consideration[s]," or must be charged in the indictment and proved to the fact finder beyond a reasonable doubt. For instance, in *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), the Court of Appeals for the Ninth Circuit vacated the sentence of a defendant who was convicted by a jury of violating 21 U.S.C. §§ 841 and 846, without the quantity of drugs ever having been specified in the indictment. At sentencing, the judge determined based on a preponderance of the evidence that Nordby was responsible for conspiring to distribute 1000 or more marijuana plants and therefore was exposed to a minimum sentence of ten years and a maximum sentence of life under § 841(b)(1)(A)(vii). The Ninth Circuit Court observed that before *Apprendi*, the Supreme Court had decided questions of which facts constituted "elements" – requiring submission to a jury and proof beyond a reasonable doubt – and

which facts constituted "sentencing factors" – allowing determination by the sentencing court by a preponderance of evidence – on the basis of statutory construction and legislative intent. *Jones v. United States*, 526 U.S. 227 (1999), was such a case; the Supreme Court held there that the enhancement provisions of the federal car jacking statute stated separate offenses that must be charged by indictment. *Id.* at 227. In *Apprendi*, however, the Supreme Court decided the issue squarely on the basis of the Fifth and Sixth Amendments. The Ninth Circuit Court therefore held:

> We reject the argument that § 841 contains "no prescribed statutory maximum," and that therefore *Apprendi* does not apply to Nordby's case. *Apprendi* makes clear that the "prescribed statutory maximum" refers simply to the punishment to which the defendant is exposed solely under the facts found by the jury. [Citation omitted.] Thus, under *Apprendi* the "prescribed statutory maximum" for a single conviction under § 841 for an undetermined amount of marijuana is five years.

225 F.3d at 1059.

The Court concluded that the only sentence allowed by the jury's finding in that case was imprisonment for up to five years under 21 U.S.C. § 841(b)(1)(D).

> We conclude that the district court erred by sentencing Nordby under 21 U.S.C. §§ 841 and 846 for manufacturing, possessing with intent to distribute and conspiring to possess with intent to distribute 1000 or more marijuana plants without submitting the question of marijuana quantity to the jury and without a finding that the marijuana quantity had been proved beyond a reasonable doubt.

Id. at 1059.

In *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000)(Petition for cert. filed Oct. 16, 2000), a jury convicted the defendant of conspiring to distribute methamphetamine contrary to 21 U.S.C. §§ 841(a)(1) and 846 and the sentencing court found that the quantity for which the defendant was responsible was between three and fifteen kilograms. With other adjustments called for by the Sentencing Guidelines, the trial court determined the applicable sentencing range to be 240 to 293 months, and imposed a sentence of 240 months, which is the statutory minimum sentence under §

841(b)(1)(A). *Id.* at 930. The statutory sentencing range without reference to drug quantity is zero to thirty years. 21 U.S.C. § 841(b)(1)(C). The Eighth Circuit Court held that the *Apprendi* decision constitutionally redefined the distinction between "elements" and "sentencing factors":

> A judge-found fact may permissibly alter a defendant's sentence within the range allowed by statute for the offense simpliciter. But when a statutory "sentencing factor" increases the maximum sentence beyond the sentencing range otherwise allowed given the jury's verdict, then the sentencing factor has become the tail which wags the dog of the substantive offense. A fact, other than prior conviction, that increases the maximum punishment for an offense is the functional equivalent of an element of a greater offense than the one covered by the jury's verdict.

Id. at 933 (internal quotes and citations omitted). Relying on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which the *Apprendi* Court expressly left intact, the Eighth Circuit Court upheld Aguayo-Delgado's sentence because it was "within the statutory range authorized by § 841(b)(1)(C) without reference to drug quantity. 220 F.3d at 934.

The Court of Appeals for the Fifth Circuit reached a similar result in *United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000). In that case, the Court observed that the prior practice within the Circuit of allowing drug quantities to serve as a sentencing enhancement factor to be determined by the trial judge was invalidated by *Apprendi. Id.* at 574-575. However, the Court held that the sentence must be vacated only when it is beyond the statutory range of the greatest offense supported by the facts found by the jury. *Id.* at 576.

Although the Sixth Circuit has not yet addressed the issue of whether *Apprendi* mandates that drug quantities be charged in the indictment, the Court of Appeals has recently considered the effect of the *Apprendi* decision on other facts which can enhance a sentence of a defendant convicted under 21 U.S.C. § 841(a). In *United States v. Rebmann*, 226 F.3d 521 (6th Cir. 2000), the defendant pleaded guilty to distribution of heroin contrary to 21 U.S.C. § 841(a)(1). At sentencing, the trial judge found by a preponderance of evidence that the drug-induced death of the defendant's ex-husband

was caused by the heroin distribution and thereby enhanced the defendant's sentence exposure from a maximum of twenty years to a maximum of life imprisonment. The defendant was sentenced to 292 months (24 years, 4 months). The Court of Appeals held that the "death resulting" fact was an "element" of the offense which must be proved beyond a reasonable doubt.

> We conclude that pursuant to her plea agreement, Rebmann waived her right to a jury trial of the issue of whether her distribution of heroin caused the death. However, we find that Rebmann did not waive the right to have a court decide any remaining elements of the offense beyond a reasonable doubt, as opposed to making those determinations by a mere preponderance of the evidence. Because the provisions at issue are factual determinations and because they increase the maximum penalty to which Rebmann was exposed, we find that they are elements of the offense which must be proven beyond a reasonable doubt.

226 F.3d at 524-25.

Based on the foregoing decisions, the following principles emerge. First, the *Apprendi* decision requires the examination of the penalty provisions of criminal statutes to determine whether a fact must be charged in an indictment and proved beyond a reasonable doubt irrespective of perceived or demonstrated legislative intent. Second, any fact, other than a prior conviction, which increases the maximum punishment for an offense must be charged by the grand jury and proved beyond a reasonable doubt. Third, the drug quantities contained in the schedule of maximum sentences set forth in 21 U.S.C. § 841(b) determine the maximum sentence exposure facing a defendant, and therefore must be charged by the grand jury and proved beyond a reasonable doubt. Fourth, an indictment charging a violation of 21 U.S.C. § 841(a) but which does not specify the quantity of the controlled substance states an offense with a maximum penalty that cannot be enhanced under § 841(b) by reference to the amount of drugs. Finally, a defendant who is convicted of an indictment which is silent as to the quantity of drugs is exposed only to the maximum sentence supported by the jury's finding, that is, to the greatest sentence prescribed by the statute without reference to drug quantity.

III.

Turning to the question of whether the Fourth Superseding Indictment relates back to the return date of the Second Superseding Indictment, this Court must examine the nature of the crime charged in the Second Superseding Indictment together with the maximum sentence which the defendant would face thereunder, and compare the Fourth Superseding Indictment to determine whether and to what extent "it broadens the charges made" in the Second Superseding Indictment. *United States v. Grady*, *supra*, 544 F.2d at 601, *United States v. Smith*, *supra*, 197 F.3d at 228.

The government argues that the Fourth Superseding Indictment does not broaden the charges in this case because the defendant's life sentence for the (now reversed) conviction under First Superseding Indictment, which is essentially the same as the charges contained in the Second Superseding Indictment, was based on judicial findings under the preponderance-of-evidence standard. The Fourth Superseding Indictment merely transfers the responsibility for those findings to the jury, and enhances the standard of proof in the defendant's favor. Therefore, the government contends, the defendant's claim is unfounded that his sentence exposure is increased under the Fourth Superseding Indictment.

Although the government's argument has a practical appeal, the Court cannot accept it because it is contrary to fundamental constitutional principles. In *Apprendi*, the Supreme Court held that a defendant has a constitutional right to have his trial jury determine beyond a reasonable doubt all the facts which establish or increase the maximum penalty to which the defendant is exposed. 120 S. Ct. at 2383. Furthermore, under the Fifth Amendment, a federal defendant has a right to prosecution by grand jury indictment. U.S. Const., Amend. V, *Ex Parte Bain*, 121 U.S. 1 (1887). In *Stironi v. United States*, 361 U.S. 212 (1960), the Supreme Court reaffirmed the rule that "after an indictment has been

returned its charges may not be broadened through amendment except by the grand jury itself." *Id*. at 215-16.

In the Second Superseding Indictment, the grand jury in this case charged a violation of 21 U.S.C. §§ 841(a)(1) and 846 without any reference to drug quantities. Presumably, this indictment was returned based on the evidence presented to the grand jury, and it was consistent with the practice approved in *United States v. Moreno, supra*. However, according to the post-*Apprendi* authority cited above, the maximum period of confinement for which the defendant could be sentenced is stated in 21 U.S.C. § 841(b)(1)(D), which is the only penalty provision in the statute which does not enhance the maximum sentence for marijuana based on drug quantity.

Apparently recognizing that a charge may not be broadened except by the grand jury, the government went back to the grand jury which returned the Fourth Superseding Indictment and specified drug quantity and the defendant's prior convictions. The defendant's sentence exposure thereunder is life imprisonment according to 21 U.S.C. § 841(b)(1)(A)(vii) based on the allegation that the drug quantities "total[ed] 1000 kilograms or more of marijuana." (Fourth Superseding Indictment)

Although the government is correct in its conclusion that the Fourth Superseding Indictment serves to transfer proof of drug quantity from the sentencing judge to the trial jury, the conclusion also is unavoidable that the Fourth Superseding Indictment significantly broadens the charge against the defendant.

IV.

In the Opinion and Order Granting Defendant's Motion to Dismiss the Third Superseding Indictment, this Court's predecessor analyzed the principles of notice and fairness which are served

by the statute of limitations. That analysis need not be repeated here. It is sufficient to observe only that under the post-*Apprendi* analysis of 21 U.S.C. § 841 made by the courts in *Rebmann, Nordby, Aguayo-Delgado,* and *Meshack,* the Second Superseding Indictment put the defendant on notice that he was charged with violating § 841(a) without any enhancement of a potential maximum sentence based on drug quantity. "For purposes of the statute of limitations, the 'charges' in the superseding indictment are defined not simply by the statute under which the defendant is indicted, but also by the factual allegations that the government relies on to show a violation of the statute." *United States v. Italiano,* 894 F.2d 1280, 1282 (11th Cir. 1990). The Second Superseding Indictment is silent as to factual allegations of drug quantity upon which the government must rely to support the enhanced sentence. The Fourth Superseding Indictment furnishes that fact, but in so doing it broadens the charges against the defendant.

For the same general reason that the Court previously dismissed the Third Superseding Indictment – *i.e.*, a violation of the statute of limitations because the "expanded" indictment did not relate back to the date the Second Superseding Indictment was returned – the Fourth Superseding Indictment must be dismissed as well.

V.

The Court is compelled to note, however, that its holding is limited to the question of whether the crime charged in the Fourth Superseding Indictment is substantially broader than that charged in the Second Superseding Indictment based on the addition of allegations relating to the quantity of drugs. Because those allegations increase the maximum sentence, the rule announced in *Apprendi v. New Jersey*, and expounded by the Courts of Appeals in the decisions cited above, was invoked to compare the charges contained in the two indictments. This Court has not decided, and expresses no

opinion upon, the question of whether the drug quantity can be used as a sentencing factor to determine the range of the sentence within the statutory maximum term under the Sentencing Guidelines. *See United States v. Meshack, supra.* Nor has the Court determined whether the defendant's prior convictions can enhance the maximum sentence as prescribed by 21 U.S.C. § 841(b)(1)(D). *See Almendorez-Torres v. United States*, 523 U.S. 224 (1998), *Apprendi v. New Jersey, supra*, 110 S. Ct. at 2355. Those issues will abide another day.

VI.

For the reasons stated above, the defendant's Motion to Dismiss the Fourth Superseding Indictment is granted. The case shall proceed to trial on **October 31, 2000**, on the Second Superseding Indictment.

IT IS SO ORDERED.

/s/
DAVID M. LAWSON
U.S. DISTRICT COURT JUDGE

Dated: November 8, 2000

CC: David S. Steingold, Esq.
Rod O'Farrell, Esq.
Janet L. Parker, Esq.